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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. ~~1017~~ 157

PAUL PEROTTI and ALFRED ANGELO CALABRESE,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

EARLE E. WISE,
416 Peoples-Merchants Trust Bldg.,
Canton, Ohio,
MICHAEL A. PICCIANO,
702 Engineers Bldg.,
Cleveland, Ohio,
Attorneys for Petitioners.

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THE STATE OF OHIO,
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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

Petitioners pray that a Writ of Certiorari issue to review the judgment and final order of the Supreme Court of the State of Ohio, in State of Ohio, Appellee vs. Perotti, *et al.*, Appellants, No. 36,166, entered on March 2, 1960, and its refusal to reconsider, entered on March 23, 1960.

OPINIONS BELOW.

The journal entries of judgment in the Court of Common Pleas of Stark County (Canton), Ohio, are unreported and appear herein as Appendix A and B, pp. 28 and 29.

The majority opinions as well as the dissenting opinion of the Court of Appeals for Stark County, Ohio (Fifth Judicial District of Ohio) are unreported and are appended hereto (Appendix "C," "D" and "E," pp. 30, 45 and 50). The Journal Entry of the Court of Appeals of Stark County, Ohio, is appended hereto as Appendix F, p. 64.

The opinion of the Supreme Court of Ohio is reported in 170 O. S. 363, 31 Ohio Bar, No. 10, March 7, 1960, and is appended hereto (Appendix G, p. 65).

The Journal Entry of the Supreme Court of Ohio affirming judgment against these petitioners is part of the certified record of the Court below that is filed in this Court.

The judgment of the Supreme Court of Ohio denying petitioners' application for rehearing on March 23, 1960, appears in 33 Ohio Bar, No. 13, on March 28, 1960, and is part of the certified record of the court below that is filed in this Court.

The journal entry of the Supreme Court of Ohio denying petitioners' application for rehearing is also part of the certified record of the Court below that is filed herewith.

JURISDICTION.

The judgment of the Supreme Court of Ohio was announced on March 2, 1960.

Rule XX, Section 1 of the Rules of Practice of the Supreme Court of Ohio provides that no motion can be made for rehearing. Application for rehearing of any cause shall be made within fourteen (14) days of the announcement of the decision and shall be confined strictly to reasons for a rehearing.

Rule XX, Section 4 of the Rules of Practice of the Supreme Court of Ohio, pertinently provides:

> "One week after the announcement of the decision of any cause on the General Docket the Clerk shall issue a Mandate as provided by the entry of this Court * * *, provided, that if the Clerk be notified, within one week after announcement of a decision on the * * * general docket that application for a rehearing

will be filed, such Mandate or certified copy of entry shall be held until such application be disposed of by the Court or the time for filing the same has expired and shall be then forthwith issued. * * *"

A timely application for rehearing was filed. It was denied by the Supreme Court of Ohio on March 23, 1960.

From the final judgment of the Supreme Court of Ohio after the filing and denial of application for rehearing petitioners have no further appellate remedy under the laws of Ohio.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257 (3) and Amendments V, VI and XIV to the Constitution of the United States; Section 1257 (3).

28 U. S. C. A. pertinently provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court, as follows:

"(3). By writ of certiorari, * * *, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * *."

QUESTIONS PRESENTED.

Whether the cumulative effect of the conduct, remarks, attitude and mannerisms of the Trial Court throughout the trial were improper, contrary to law and highly prejudicial to the substantial rights of petitioners, as to deprive them of a fair and impartial trial, violative of the Due Process Clause of Amendments V, VI and XIV to the Constitution of the United States, and Article I, Sections 10 and 16 of the Constitution of the State of Ohio, under the circumstances of this case, as shown by the record.

(I) (a) Where four persons are jointly indicted for murder in the first degree in perpetrating or attempting to perpetrate burglary, to which indictment, on arraignment each defendant enters a plea of Not Guilty, but the self-confessed triggerman accomplice also reserves the right to later enter plea of "Not Guilty by reason of Insanity," and later at the joint trial of two co-defendants the accomplice triggerman (who has not yet been brought to trial) testifies on behalf of the State, with no determination beforehand, by the Trial Court, or by jury of the question of his sanity or insanity, as mandatorily required by law; and

(b) Where the triggerman accomplice, on cross-examination by defense counsel admits that he has been promised his life for testifying in the case, to which question and answer there is no objection by the prosecutor, but the Court interrupts the cross-examination, and, addressing defense counsel, remarks: *"By whom? Let's not have intimations unless you have some proof,"* whereupon defense counsel offers to step up to the bench and give names of witnesses, to which statement the prosecutor then objects, because the statement is made in the presence of the jury. (Italics ours.)

(II) Where the Trial Court, without ruling on the objection of the prosecutor, or accepting proffer made by defense counsel (to step to the bench and give names of witnesses) again addresses defense counsel and asks whether the promise (of the life of the witness) was made by "this Court" and defense counsel replies "There was no Court involved."

(III) Where the Court, again addressing himself to defense counsel, then remarks: "I don't think anybody, Mr. Wise, can speak other than the Court" and counsel

states that he realizes that, but wonders if the witness does in the light of his answer, followed by another objection by the prosecutor to the argument in the presence of the jury.

(IV) Where the Court then sustains the objection of the prosecutor and the prosecutor states "*I didn't object to the question, it was answered, no, there is no objection to that particular question,*" and, in answer to the further question by the Court, "Which one did you object to?" answers, "*I didn't object, Your Honor, I objected later when counsel began to talk to the Court and jury*" and the Court rules that "The question and answer may remain." (Italics ours.)

(V) Where, at the conclusion of the testimony of the same accomplice, after both counsel have indicated there are no further questions, the Court comments upon the importance of this testimony and then assumes the role of the prosecuting attorney and proceeds to interrogate the accomplice as to the source of the promise of his life, and by so doing, rehabilitates the witness to the point that he then says "*Your Honor, no one ever promised me my life in this case,*" thereby directly contradicting his former answer. (Italics ours.)

(VI) Where, during the cross-examination of one of these petitioners then on trial, the trial court improperly comments on the sufficiency of the evidence in the presence of the jury, with the remark "*Never mind, I don't want to hear, there is plenty of proof.*" (Italics ours.)

(VII) Where, during the cross-examination of one of these petitioners then on trial, the prosecutor states to the Court: "The purpose of this line of interrogation is to show this man is putting on a big act here," to which the Court replies "*That is correct.*" (Italics ours.)

(VIII) Where, in the presentation of the defense, defense counsel on direct examination of petitioner, Paul Perotti has the witness identify certain pictures (Defendant's Exhibits 7 and 10) tending to support the alibi claimed by defendants, which exhibits were received without objection, whereupon counsel requested permission to pass them to the jury, the Court remarked "*No, not at this time. They are not of a great deal of importance.*" (Italics ours.)

(IX) Where the Court orders defense counsel to "*be seated*" and not to interrupt the cross-examiner unless it's really important, and that the Court "don't see any objection at this time."

(X) Where the Court, faced with an objection by defense counsel, admonishes him "*that this is cross-examination and shouldn't be interrupted.*" (Italics ours.)

(XI) Where the Court, in overruling an objection of defense counsel, remarks that he doesn't like the cross-examination interrupted (by defense counsel) "when there is no—I don't see anything unfair about the question or answer."

(XII) Where, during cross-examination by the prosecutor of an alibi defense witness, defense counsel respectfully calls attention that the matter has already been gone over, the record shows:

> "The Court: *Just a moment, Mr. Wise, that's an unfair interruption.*
>
> Mr. Wise: I can't object?
>
> The Court: You didn't object.
>
> Mr. Wise: I am objecting.
>
> The Court: *Let's get this straight, Mr. Wise, I don't want you to interfere when questions are asked unless there is an objection.*
>
> Mr. Wise: Objection.

The Court: Overruled." (Italics ours.)

(XIII) Where, during cross-examination by the prosecutor, defense counsel asks leave to interrupt, the Court replies "*Let's not interfere. This is cross-examination, * * * and this is one of the vital matters of the case * * * but let's not do any more interrupting than we have to.*" (Italics ours.)

(XIV) Where the Court shows his displeasure when an objection is interposed by defense counsel during cross-examination and admonishes counsel "*you may make all the objections you want at recess, but you are not to interrupt the cross-examination, please.*" (Italics ours.)

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment V to the Constitution of the United States pertinently provides:

> "No person shall * * * be deprived of life, liberty or property without due process of law; * * *."

Amendment VI to the Constitution of the United States pertinently provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *, and to have assistance of counsel for his defense."

Amendment XIV to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws."

Article I, Section 10 of the Constitution of the State of Ohio pertinently provides:

> "Except in cases of impeachment, * * *, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital or otherwise infamous, crime, unless on presentment or indictment of a grand jury; * * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * *, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; * * *."

Article I, Section 16 of the Constitution of Ohio pertinently provides:

> "All courts shall be open, and every person for an injury done him in his * * *, person or reputation, shall have justice administered without denial or delay."

STATEMENT OF THE CASE.

I. PROCEDURAL HISTORY OF THE CASE.

On the night of February 7, 1957, one Eldon Shoup was shot by Paul Frederick Carpenter, while Carpenter and two accomplices were in the process of burglarizing the home of Frank Wells, one of the bigger gamblers in Alliance, Stark County, Ohio. Eldon Shoup died as a result of the gunshot wound at about 10:30 o'clock P.M. that same night. (R. 659.)

In early May, 1957, Paul Carpenter, while in the Summit County Jail at Akron, Ohio, on an unrelated burglary charge, signed a statement confessing that he shot Eldon

Shoup on the night of February 7, 1957, and implicated the petitioners and one Arthur LaRiche. (R. 709.)

On May 4th or 5th, 1957, the petitioners were apprehended. On May 13th, 1957, the Grand Jury of Stark County, Ohio, returned an indictment for murder in the first degree, jointly charging the petitioners together with Paul Frederick Carpenter and Arthur LaRiche, with purposely killing Eldon Shoup, on or about February 7, 1957, in perpetrating or attempting to perpetrate burglary.

The indictment was drawn under Section 2901.01 of the Revised Code of Ohio, which pertinently provides:

> "Murder in the first degree. (G. C. Sections 12400, 12399.) No person shall purposely, * * * or in perpetrating or attempting to perpetrate * * * burglary, kill another.
>
> Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life. Murder in the first degree is a capital crime under Sections 9 and 10 of Article I, Ohio Constitution."

At the same time a companion indictment for burglary was returned against the same four persons charged in the murder indictment, naming also one Raymond Paone who had informed Carpenter that there was money in a safe in the Wells home and had counselled and planned the burglary. Paone however was not named in the murder indictment.

On arraignment on the murder indictment petitioners entered a plea of Not Guilty.

Paul Frederick Carpenter also entered a plea of not guilty and reserved the right to later enter a plea of "Not guilty by reason of insanity" (R. 740).

On November 13, 1957, petitioners filed their motion for joint trial which was granted.

On November 13, 1957, petitioners seasonably filed a "Notice of Alibi."

On November 21, 1957, petitioners were jointly tried before a jury which was unable to agree upon a verdict and was discharged on December 5, 1957.

On April 1, 1958, petitioners were again put on trial before another jury which returned a verdict of Guilty on April 17, 1958, and recommended mercy.

The accomplice Paul Frederick Carpenter and Raymond Paone testified on behalf of the State in both trials.

Paul Frederick Carpenter has not yet been brought to trial on either the murder or burglary indictment. Nor has Raymond Paone been brought to trial on the burglary indictment in which he was named a defendant.

In the brief of the State of Ohio in both the Court of Appeals and in the Supreme Court of Ohio, the prosecutor stated that the remaining defendant Arthur LaRiche, who was named in both indictments had been permitted to plead guilty to first degree manslaughter under the murder indictment, and to plead guilty to burglary of an inhabited dwelling, under the burglary indictment.

Motion for new trial was filed by petitioners on April 19, 1958 and overruled on April 30, 1958.

On April 30, 1958, petitioners were sentenced for life to the Ohio State Penitentiary where they both are presently confined.

On May 28, 1958, a Notice of Appeal to the Court of Appeals of Stark County, Ohio, was filed.

On April 21, 1959, the Court of Appeals of Stark County, Ohio, by a divided Court affirmed the judgment, one judge dissenting. (Majority Opinion of McClintock, J., Appendix C, p. 30). (Concurring Opinion of Putnam, P.J., Appendix D, p. 45). (Dissenting Opinion of McLaughlin, J., Appendix E, p. 50).

The journal entry of the Court of Appeals was signed on May 11, 1959 (Appendix F, p. 64).

On June 1, 1959, Notice of Appeal was filed in the Supreme Court of Ohio:

(a) As of right in a case involving questions arising under the Constitutions of the State of Ohio and of the United States.

(b) In a felony case, and appellants intend to file a Motion in the Supreme Court for leave to appeal.

Assignment of Errors and brief of petitioners was filed in the Supreme Court of Ohio on July 31, 1959. The Assignment of Errors is part of the certified copy of the record of the Court below that is filed in this Court.

On September 18, 1959, the State of Ohio filed its motion to dismiss the appeal as of right.

The appeal of petitioners as of right and their motion for leave to appeal, together with the motion of the State of Ohio to dismiss the appeal as of right, were argued before the Supreme Court of Ohio, on October 15, 1959.

On October 21, 1959, the Supreme Court of Ohio allowed the motion of petitioners for leave to appeal and at the same time dismissed the motion of the State of Ohio to dismiss the appeal as of right.

The appeal of petitioners was argued on its merits before the entire Court in the Supreme Court of Ohio on February 16, 1960.

On March 2, 1960, in a Per Curiam Opinion by the Chief Justice of the Supreme Court of Ohio, and concurred in by three associate justices the judgment against petitioners was affirmed. The opinion of the Supreme Court of Ohio is reported in 170 O. S. 363, 31 Ohio Bar No. 10, March 7, 1960. (Opinion of Supreme Court of Ohio, Appendix G, p. 65.)

On March 16, 1960, petitioners filed their application for rehearing in the Supreme Court of Ohio under Rule XX of the Rules of Practice in the Supreme Court of Ohio.

On March 23, 1960, the Supreme Court of Ohio denied petitioners application for rehearing. The journal entry of the Supreme Court of Ohio denying the application for rehearing is part of the certified record of the Court below that is filed in this Court. Petitioners have no further remedy for appellate review in the state courts of Ohio.

II. THE FACTS MATERIAL TO THE QUESTIONS PRESENTED.

Paul Frederick Carpenter who admits firing the fatal shot that killed Eldon Shoup, testified for the State against petitioners. Prior to the night of the homicide he had been informed by Raymond Paone that Frank Wells was a gambler; that Wells was in Florida vacationing with his family at the time and that in the basement of the Wells home in Alliance, Ohio, there was a safe. He was also informed by Paone that while the Wells family was in Florida, a caretaker checked the house at night, turned on the lights in the front room each night and returned in the morning and turned the light off (R. 666, 667, 759).

A day or two before February 7, 1957, Paone accompanied Paul Carpenter and Arthur LaRiche to the vicinity of the Wells home in Alliance, Ohio, and also showed them the home of Mr. Earl Shoup, the caretaker of the Wells home during the absence of the Wells family (R. 668).

Carpenter testified that on the night of February 7, 1957, he, Paul Perotti and Arthur LaRiche broke into the home of Frank Wells (R. 665). Carpenter acting as look-

out while Arthur LaRiche and Paul Perotti proceeded to the basement (R. 684).

Shortly thereafter they were interrupted by the caretaker, Mr. Earl Shoup and his son, Eldon who came to the back door. Earl Shoup, the father, opened the door and proceeded to the basement—while the boy Eldon remained outside (R. 685). As Carpenter started toward the stairway to go down to the basement, Arthur LaRiche came running up the cellar stairway with (Earl) Shoup chasing him up the stairs. They ran past Carpenter, out the door, and into the back yard where they struggled (R. 686).

Carpenter, who had a pistol with him, stood there watching the struggle when LaRiche yelled "Shoot the bastard" so, according to Carpenter, "I used my head" and started to fire at the man LaRiche was struggling with, and the man let go of LaRiche. The boy, Eldon, had followed them out into the back yard and according to Carpenter "he started yelling and started at me, and so when he yelled I turned on him and he started to come at me and I fired at him." The boy fell when Carpenter fired (R. 687). Eldon Shoup died at about 10:30 P. M. that same night, February 7, 1957, (R. 659) from bleeding in the left side of the chest cavity and tearing of the lung caused by a bullet wound (R. 657).

In early May, 1957, Paul Carpenter was in the County Jail of Summit County in Akron, Ohio, on an unrelated burglary charge which had been committed in early 1956 (R. 709). At that time Carpenter called in the Chief Deputy of Summit County and told him he had killed a man (in Alliance) and gave him the whole story (R. 711).

In addition to their plea of "not guilty" petitioners filed Notice of Alibi to the effect that at the time of the commission of the homicide they were at Millersburg, Kentucky, visiting the son of petitioner, Calabrese, who

was a cadet at the Millersburg Military Academy. They were on their way home, driving in Calabrese's car, from Pensacola, Florida. Several disinterested witnesses, including a Roman Catholic nun whom the petitioners had visited while in Pensacola corroborated the alibi of petitioners.

During the cross-examination of Paul Carpenter by defense counsel, in the early stages of the trial, the record shows:

"Q. Were you promised your life to testify in this case?

A. *Yes.*

The Court: What was that last question?

Mr. Wise: I asked if he was promised his life to testify in this case.

The Court: By whom? *Let's not have intimations unless you have some proof.*

Mr. Wise: Your Honor, I am prepared to have witnesses * * * step to the bench and give names of certain witnesses.

Mr. Putman: *Object to that.*

The Court: Was it this Court?

Mr. Wise: No, sir, Your Honor, there is no * * *

The Court: What court was it?

Mr. Wise: *There was no Court involved.*

The Court: *I don't think anybody Mr. Wise can speak other than the Court.*

Mr. Wise: I realize that your Honor, but I wonder if this witness does in light of the statement he made.

Mr. Putman: Object to the argument in the presence of the jury.

The Court: Let's not argue.

Mr. Wise: May I go on, Your Honor?

The Court: *Sustained.*

Mr. Putman: *I didn't object to the question, it was answered, no, there is no objection to that particular question.*

The Court: Which one did you object to?

Mr. Putman: *I didn't object, Your Honor, I objected later when counsel began to talk to the Court and jury.*

The Court: The question and answer may remain." (R. 741, 742.) (Italics ours.)

Under this ruling of the Court, the jury had the benefit of this most damaging admission from the lips of Paul Carpenter which could weigh heavily in the determination of Carpenter's credibility by the jury. The Court, however, on its own initiative, then immediately proceeded to rehabiliate the witness Carpenter and to completely nullify the effect of the damaging admission just made by Carpenter, which the Court had permitted to remain.

At the conclusion of the cross-examination of Paul Carpenter, the record shows:

"Mr. Wise: I think that's all.

Mr. Putman: No further questions. One moment please.

The Court: So we may clarify this, *it is very important. Did any judge ever offer you your life in this charge of Murder in the First Degree in this case?*

A. *Your Honor, no one ever promised me my life in this case.*

The Court: The Prosecutor?

A. No.

The Court: Or his office?

A. No.

The Court: That's all." (R. 743, 744.) (Italics ours.)

Section 2945.37 of the Revised Code of Ohio, provides:

"If the attorney for a person accused of crime whose cause is pending in the court of common pleas, before or after trial suggests to the court that such person is not then sane, * * * *or if it otherwise come to the attention of the court that such person is not then sane, the court shall proceed to examine into the question of sanity or insanity of said person, or in its discretion may impanel a jury* for such purpose. * * *." (Italics ours.)

In *Evans vs. State of Ohio,* 123 O. S. 132, Section 13441-1, G. C., the forerunner of present Section 2945.37, Revised Code, was construed by the Supreme Court of Ohio, as requiring affirmative action by the trial court, who is required "either forthwith to inquire into the question of sanity or insanity of such defendant, or to impanel a jury to do so."

True, Carpenter was not on trial, but he most assuredly was a defendant accused of crime, whose cause was pending in the Court of Common Pleas at the time he raised the question of insanity by reserving the right to enter a plea of "not guilty by reason of insanity." He therefore, came within the purview of the statute, and subject to its provisions.

In the case at bar, the Court did not discharge its mandatory duty under the statute, of determining the question of the sanity or insanity of Carpenter, once it was called to the Court's attention by his motion reserving the right to enter a plea of "not guilty by reason of insanity."

Comments of the Court on the Weight of the Evidence—Sufficiency of Proof.

During the cross-examination of petitioner Alfred Angelo Calabrese, the prosecutor was inquiring about certain unemployment compensation forms allegedly signed by petitioner Calabrese:

> "Q. And that is referred to and you have understood it to mean a subsequent report in person from the small one?
>
> Mr. Wise: Object.
>
> The Court: Yes, yes, Mr. Putnan, let's get along please.
>
> Mr. Putman: If it please the Court—
>
> The Court: *Never mind, I don't want to hear —there is plenty of proof.*" (R. 1259.) (Italics ours.)

Remark of Court as to Credibility of Petitioner, Paul Perotti.

During the cross-examination of petitioner, Paul Perotti, he was asked the name of one of his alibi witnesses —whether it was Captain Humphrey or Captain Pumphrey. The prosecutor, referring to the first trial (in which the jury had disagreed), asked the witness:

> "Q. At that time you used the name of Captain Pumphrey correctly and without hesitation and told over 13 times—
>
> Mr. Wise: Object, Your Honor, to this whole—
>
> The Court: Overruled, it's cross-examination.
>
> Mr. Wise: Let the record show an objection on the basis of the questioning on the prior trial without having laid the foundation for any inconsistent statements * * *.
>
> Mr. Putman: First of all, if it please the Court, there is no requirement for the same testimony under oath, the same witness, to lay the same type

of foundation that you do where you are talking about a conversation with a third party. *The purpose of this line of interrogation is to show this man is putting on a big act here.*

The Court: *That is correct.*" (R. 1032, 1033.) (Italics ours.)

Court's Comment on Immateriality of Defense Exhibits Offered and Received in Evidence.

Defense counsel had offered Defendants' Exhibits 7 and 10 which tended to support the alibi of petitioners. The record shows:

"Mr. Wise: I offer them in evidence.

The Court: They may be received.

Mr. Putman: No objection.

Mr. Wise: Now I ask to pass them to the jury.

The Court: No, not at this time. *They are not of a great deal of importance.*

Mr. Wise: Object on that Your Honor, I mean they are of great importance.

The Court: The pictures are important, yes, but I mean the fact of looking at them at this time—so there is no misunderstanding." (R. 1003, 1004.) (Italics ours.)

Court orders defense counsel to be seated—not to interrupt cross-examination unless it's really important—Court sees no objection at this time—Court admonishes defense counsel that cross-examination shouldn't be interrupted—Court sees nothing unfair about question and answer—Court's comment on "one of the vital matters of the case"—Court orders defense counsel to make his objections at recess, and not to interrupt the cross-examination.

During the cross-examination of petitioner, Alfred Angelo Calabrese, the record shows:

"The Court: Please don't interrupt, Mr. Wise, *be seated.*

Mr. Wise: Shall I make my objection from the table?

The Court: Yes, let the jury hear it. *Don't interrupt the cross-examination unless it's really important. I don't see any objection at this time.*" (R. 1218.) (Italics ours.)

Again, the record shows that during the cross-examination of petitioner, Alfred Angelo Calabrese, defense counsel objected to the prosecutor's phrasing of a question:

"Mr. Wise: I am objecting to the phrasing, he didn't testify—

Mr. Putman: I am objecting to instructing the witness from the table again.

The Court: Overruled. As the Court recalls somebody said he didn't register, he sneaked up.

Mr. Wise: I am talking about the name of the hotels, there were two hotels.

Mr. Putman: I am trying to find out if the witness knows, I know what Mr. W e—

The Court: *This is cross-examination and shouldn't be interrupted.*" (R. 1241, 1242.) (Italics ours.)

Again, the record shows the Court finding fault with defense counsel for objecting, when the Court "don't see anything unfair about the question or answer":

"Mr. Wise: Object.

The Court: Overruled.

Mr. Wise: May I approach the Bench, Your Honor?

The Court: No, please.

Mr. Wise: I will say it from here instead. Let the record show my remarks. I don't want to say it from the floor in the presence of the jury, but I can't approach the Bench and make it for the record.

The Court: I don't like to interrupt on cross-examination when there is no—*I don't see nothing*

unfair about the question or answer." (R. 1248.) (Italics ours.)

* * * * * *

"Mr. Wise: I don't like to do this, Your Honor, but I am going to put it into the record. In fact, every time I have asked to make an objection, the Court has admonished counsel, in fact, has deliberately not allowed me to do it. I have tried very politely, I have to interrupt counsel to make my record. *I would like to approach the stenographer and read it into the record so it is not in the presence of the jury and the Court has said he didn't like any interruptions. The only way I can preserve my record under the statutes of the State of Ohio is to make proper and seasonable objections and to put my reasons for my objections, whether they are overruled or sustained, into the record. The stenographer cannot take two persons at once and I must approach the stenographer to make my record.*

The Court: I am willing to let you make your objections, but let the record show I don't want argument." (Italics ours.)

* * * * *

"Mr. Wise: I am not making them in front of the jury, I am trying to come forward. I have that right.

The Court: To object, yes, but not to argue in the case.

Mr. Wise: And I say further for the record that to preserve my record and proffer my answer or my objection for the review of a higher court I certainly have the right to approach the stenographer and make those remarks into the record, *and the Court continually refers to the jury as though I am just impeding the trial, which again is prejudicial, and I think the Court should tell the jury I have the right to make.* * * *" (R. 1248-1250.) (Italics ours.)

Again the record shows that during cross-examination defense counsel called attention to the fact the subject of inquiry had already been gone over:

"Mr. Wise: We have been over this, Your Honor.

The Court: *Just a moment, Mr. Wise, that's an unfair interruption.*

Mr. Wise: I can't object?

The Court: You didn't object.

Mr. Wise: I am objecting.

The Court: *Let's get this straight, Mr. Wise, I don't want you to interfere when questions are asked unless there is an objection.*

Mr. Wise: Object.

The Court: Overruled."

* * * * *

"Mr. Wise: May I interrupt. Read the Court's remarks.

(Stenographer read court's remarks back.)

I want a copy of that this afternoon.

The Court: Now let's start over, let's not interfere. This is cross-examination, this witness said time and again he doesn't remember, he doesn't recollect, and *this is one of the vital matters of the case.* * * *" (R. 1642, 1643.) (Italics ours.)

Again, during the cross-examination of an alibi witness, the record shows defense counsel objecting to a conversation between the witness and a third party, obviously out of the presence of petitioners, and whether the witness then talked to defense counsel on the telephone:

"Mr. Wise: Object.

The Court: Overruled.

Mr. Wise: I want to make my objections for the record.

The Court: *Now, Mr. Wise, you may make all the objections you want at recess, but you are not to interrupt the cross-examination, please.*" (R. 1645.) (Italics ours.)

III. FEDERAL QUESTIONS RAISED BELOW IN THE TRIAL COURT.

(A) By Motion for new trial, wherein among the errors assigned petitioners complained of certain orders of the trial court, by which they were denied a fair trial and their constitutional rights violated. (Assignment of Error No. 4.)

Denial of a fair trial to petitioners by the numerous remarks of the Trial Court, admonishing defense counsel not to interrupt the cross-examination and to make whatever objections he had at recess, thereby restricting counsel's right, duty and privilege to object to incompetent testimony, in the presence of the jury. (Assignment of Error No. 11.)

Other errors apparent upon the face of the record to the prejudice of these defendants, as affirmatively appears from the record. (Assignment of Error No. 14.)

(B) In the Court of Appeals of Stark County, Ohio by Assignment of Error No. 4:

"Errors on the part of the Trial Court in that the defendants were deprived of a fair and impartial trial for the reason that the Trial Court's conduct, manner and remarks were improper, contrary to law, and highly prejudicial to the substantial rights of the Defendants."

(C) In the Supreme Court of Ohio

By appeal as of right in a case involving questions arising under the Constitution of the United States and the Constitution of the State of Ohio.

The Notice of Appeal to the Supreme Court of Ohio is a part of the certified record of the Court below that is filed in this Court.

By brief of petitioners in the Supreme Court of Ohio, in which the 3rd Assignment of Error was:

> "The defendants were deprived of a fair and impartial trial and of their rights guaranteed them by Sections 10 and 16 of Article I of the Constitution of Ohio and Amendments V, VI and XIV to the Constitution of the United States.".

The Assignment of Errors filed by petitioners in the Supreme Court of Ohio is part of the certified record of the Court below that is filed with this Court.

ARGUMENT.

I. Certiorari should be granted in the instant case because of important questions involved as to whether the cumulative effect of the remarks, conduct and mannerisms of the Trial Judge—his attitude toward defense counsel—his comments on the evidence and on the credibility of witnesses during the course of the trial—his failure to determine the question of insanity of Paul Carpenter, the accomplice, before permitting him to testify against petitioners as hereinbefore complained of, denied petitioners due process of law guaranteed them under Amendents V, VI and XIV to the Constitution of the United States.

In the recitation of the many unfortunate incidents which occurred in the Trial Court, we do not wish to be understood as claiming that they were done purposely or intentionally—it could well be that they occurred during moments of unguardedness on the part of the Court. We appreciate fully, that in the trial of capital cases nerves

are on edge and everyone involved is under extreme nervous tension.

We do claim, however, that these unfortunate occurrences should be appraised in the light of the ultimate effect they had upon the jury, and the prejudice engendered against the petitioners, which resulted in a denial of Due Process of them.

We do claim also, that the question asked of the witness Paul Carpenter, on cross-examination, whether he had been promised his life to testify in this case was perfectly proper. The prosecutor recognized this fact, since there was no objection. The answer "Yes" was a most important admission gained by the defense, and conversely, a most damaging blow to the case of the State—an admission which could well have justified the jury in entirely discrediting the testimony of Carpenter and resulting in a verdict of not guilty.

After the colloquy between the Court and prosecutor which clarified the objection of the prosecutor, the Court ruled "The question and answer may remain." (R. 742), thus giving the petitioners the benefit of the question and answer to which they were entitled.

However, after both counsel had indicated they had no further questions to ask Carpenter, the record shows that the Court, in a moment of overzealousness, perhaps, assumed the role of prosecuting attorney, and did that which would not have been permitted to be done by the prosecutor.

> "Mr. Wise: I think that's all.
>
> Mr. Putman: No further questions. One moment please.
>
> The Court: So we may clarify this, *it is very important*. Did any Judge ever offer you your life in this charge of Murder in the First Degree in this case?

A. Your Honor, no one ever promised me my life in this case.

The Court: The Prosecutor?

A. No.

The Court: Or his office?

A. No.

The Court: That's all." (R. 743, 744.)

By these questions which would not have been permitted by the prosecutor, the Trial Court commented on the weight of the evidence and completely nullified the former damaging admission of the witness. By this unwarranted interruption and cross-examination of the accomplice, the Trial judge also rehabilitated the witness and rescued the State of Ohio from the damaging effect of his previous admission.

The Supreme Court of Ohio, in its opinion published in 170 O. S. 363, p. 364 (Appendix G, p. 66) ascribes this to "a moment of understandable overzealousness" on the part of the trial judge. With all due deference to the opinion of the Supreme Court of Ohio, "understandable overzealousness" can never justify prejudice to the substantial rights and invasion of constitutional guaranties to persons accused of crime, especially in a capital case, where human life is at stake.

In *Williams vs. United States*, 93 F. (2d) 685 (Ninth Circuit), syllabus 1 provides:

> "1. The harm done when the trial judge departs from that attitude of disinterestedness which is the foundation of a fair and impartial trial is not diminished because the judge so acts by reason of unrestrained zeal or through inadvertence and is not intentionally unfair."

At page 687 in its opinion in the *Williams* case, *supra*, the Court said:

"One of the most meritorious assignments and specifications of error is the one that sets forth that the lower court 'erred during the trial of the case in indulging in acts of advocacy, in that the trial court, in examining and cross-examining witnesses and the defendants virtually assumed the role of a prosecuting attorney.' "

It may and will perhaps, be argued that the prejudicial effect of this was waived, because defense counsel did not object.

It is well established that counsel are not held to strict accountability for failure to object or except when the questions are asked by the Court. *Williams vs. United States*, 93 F. (2nd), 685, *supra*, Syllabus 7.

In *Gomila vs. United States*, (5th Circuit) 146 F. (2d) 372, it was held:

"3. The guarantee of a fair and impartial trial to every defendant means a trial before an impartial judge and by an impartial jury.

"5. Where serious injury may result from errors committed during trial which were patent on face of record, appellate court would notice and correct such errors *even though they were not challenged during trial.*" (Italics ours.)

In the course of its opinion, in *Gomila vs. United States*, *supra* at p. 374, the Court quotes from *Adler vs. United States*, 5th Circuit, 182 Fed. (2d) 464, p. 472:

"A cross-examination that would be unobjectionable when conducted by the prosecuting attorney *might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendants' counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is conflict between them and the court.*" (Italics ours.)

II. The Petitioners' right to the assistance of counsel was prejudicially limited and curtailed by the Trial Judge in ordering counsel not to interrupt the cross-examination and to make his objections at recess; by the Trial Court's repeated admonitions to defense counsel not to interrupt the cross-examination and implications that counsel was impeding the trial; by the Trial Court's comments on the immateriality of certain defense exhibits; the Trial Court's comments on the sufficiency of the proof, etc.

We respectfully maintain that an accused on trial for his life is entitled to the most effective assistance of counsel within the limits of counsel's ability. But when the Court, time and again, as shown by the record at bar, restricts counsel in his right to make his objections in the presence of the jury, but to make them at recess (R. 1645); when the Court time and again orders counsel not to interrupt the cross-examination and orders counsel to be seated (R. 1218) and comments on defense exhibits offered and received as not being of a great deal of importance (R. 1003) and the other acts of the trial judge hereinbefore complained of, the effectiveness of counsel is unduly limited and restricted; prejudice is engendered in the minds of the jury and Denial of Due Process has ensued. Thus, the constitutional rights of the defendants have been violated. Therefore, petitioners respectfully request that a writ of certiorari issue to the Supreme Court of the State of Ohio.

Respectfully submitted,

EARLE E. WISE,
MICHAEL A. PICCIANO,
Attorneys for Petitioners.

APPENDIX A.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS. RE PAUL PEROTTI.

This day the defendant, Paul Perotti, appeared in open court in the custody of the Sheriff and accompanied by his counsel, Earle E. Wise, Esq., and Raymond Marchbank, Jr., Esq., the said defendant heretofore being found guilty by a jury of the crime of first degree murder with a recommendation of mercy, and the defendant having thereafter filed a motion for a new trial, the Court, being fully advised in the premises, finds that said motion for new trial is not well taken.

WHEREFORE IT IS ORDERED, ADJUDGED, AND DECREED that the motion for the new trial be, and the same hereby is overruled. To all of which the defendant excepts.

Whereupon the Prosecuting Attorney moved that sentence be pronounced against the defendant, Paul Perotti. Whereupon the Court was duly informed in the premises on the part of the State of Ohio, by the Prosecuting Attorney, and on the part of the defendant, by the defendant himself, and thereafter the Court asked the defendant whether he has anything to say as to why judgment should not be pronounced against him, and the defendant, after consulting with his attorneys, said that he had nothing further to say except that which he had already said, and showing no good and sufficient reason why sentence should not be pronounced; the Court thereupon pronounced sentence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant, Paul Perotti, be committed to the Ohio Penitentiary in Columbus, Ohio, during the term of his natural life unless he shall be pardoned, paroled or otherwise released according to law and that he pay the costs of this prosecution for which execution is awarded.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, RE ALFRED ANGELO CALABRESE.

This day the defendant, Alfred Angelo Calabrese, appeared in open court in the custody of the Sheriff and accompanied by his counsel, Earle E. Wise, Esq., and Raymond Marchbank, Jr., Esq., the said defendant heretofore being found guilty by a jury of the crime of first degree murder with a recommendation of mercy, and the defendant having thereafter filed a motion for a new trial, the Court, being fully advised in the premises, finds that said motion for new trial is not well taken.

WHEREFORE IT IS ORDERED, ADJUDGED, AND DECREED that the motion for new trial be, and the same hereby is overruled. To all of which the defendant excepts.

Whereupon the Prosecuting Attorney moved that sentence be pronounced against the defendant, Alfred Angelo Calabrese. Whereupon the Court was duly informed in the premises on the part of the State of Ohio, by the Prosecuting Attorney, and on the part of the defendant, by the defendant himself, and thereafter the Court asked the defendant whether he has anything to say as to why judgment should not be pronounced against him, and the defendant, after consulting with his attorneys, said that he had nothing further to say except that which he had already said, and showing no good and sufficient reason why sentence should not be pronounced, the Court thereupon pronounced sentence.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the defendant, Alfred Angelo Calabrese, be committed to the Ohio Penitentiary in Columbus, Ohio, during the term of his natural life unless he shall be pardoned, paroled or otherwise released according to law and that he pay the costs of this prosecution for which execution is awarded.

APPENDIX C.

OPINION OF THE COURT OF APPEALS.

(Dated April 21, 1959.)

McCLINTOCK, J.

This is an appeal on questions of law from a judgment of the Court of Common Pleas of Stark County. We will refer to the parties as they were designated in the Court below, to-wit: State of Ohio, plaintiff, vs. Paul Perotti and Alfred Angelo Calabrese, defendants.

The defendants were indicated by the Grand Jury of Stark County and were charged with purposely and in perpetrating and in attempting to perpetrate a robbery did kill Eldon Shoup. To this indictment the defendants pleaded Not Guilty and the cause came on before the Court and a Jury, and the defendants were found guilty of murder in the first degree, with a recommendation of mercy. The Court thereafter sentenced the defendants and a motion for new trial was filed, which was overruled by the Court below.

Thereafter Defendants appealed to this Court on questions of law, and for their assignments of error allege the following:

"ASSIGNMENT OF ERROR NO. 1.

Errors on the part of the Trial Court in the Court's charge to the jury.

ASSIGNMENT OF ERROR NO. 2.

Errors on the part of the Trial Court in permitting and in failing to sustain the objections by the Defendants to the use of portions of testimony of the prior trial.

ASSIGNMENT OF ERROR NO. 3.

Errors on the part of the Trial Court in failing to sustain objections by the Defendants to misconduct

on the part of the Prosecuting Attorney in his continual and flagrant misuse of the record of the prior trial and the trial of this case.

ASSIGNMENT OF ERROR NO. 4.

Errors on the part of the Trial Court in that the Defendants were deprived of a fair and impartial trial for the reason that the Trial Court's conduct, manner and remarks were improper, contrary to law, and highly prejudicial to the substantial rights of the Defendants.

ASSIGNMENT OF ERROR NO. 5.

The Defendants were denied the benefits afforded them by the Constitution of Ohio and the Constitution of the United States of America, including the Amendments thereto, in that certain portions of the trial and proceedings thereto were conducted in the absence of the Defendants.

ASSIGNMENT OF ERROR NO. 6.

Errors of the Trial Court in admitting evidence offered by the State, over the objection of the Defendants, which was prejudicial to the substantial rights of the Defendants, whereby they were prevented from having a fair and impartial trial.

ASSIGNMENT OF ERROR NO. 7.

The Trial Court erred in admitting hearsay evidence over Defendant's objection, which was prejudicial to the Defendants.

ASSIGNMENT OF ERROR NO. 8.

Errors on the part of the Trial Court in failing to sustain the objections on the part of the Defendants and instructing the jury concerning improper argument on the part of the Prosecutor in his final argument.

ASSIGNMENT OF ERROR NO. 9.

That the verdict is against the manifest weight of the evidence, is not sustained by sufficient evidence, and is contrary to law.

ASSIGNMENT OF ERROR NO. 10.

Other errors apparent on the fact(e) of the record to the prejudice of these Defendants, as affirmatively appears from the record."

The facts in this case, briefly, are as follows: On February 7, 1957, the defendants, Paul Perotti and Alfred Angelo Calabrese together with Arthur LaRiche and Paul Carpenter, burglarized the home of Frank E. Wells in Alliance. During the burglary Paul Carpenter shot to death Eldon Shoup.

The Wells home had been "fingered" by Raymond Paone of Alliance. All but Paone were jointly indicted for first degree murder. All, including Paone, were jointly indicted for house burglary.

LaRiche has pleaded guilty to the indictment charging him jointly with the other four with the burglary and was sentenced to life inprisonment in the Ohio Penitentiary. Thereafter, LaRiche pleaded guilty to the homicide indictment, which charged him jointly with Calabrese, Perotti and Carpenter, after the indictment had been reduced, as to LaRiche only, to first degree manslaughter. For this he was sentenced to a 1 to 20 year term in the Ohio Penitentiary, consecutively after the life sentence for burglary.

Paone confessed immediately upon arrest to having pointed out the home to be burglarized and has testified twice for the State against Perotti and Calabrese. He is presently free on bond awaiting trial.

Carpenter first confessed in Akron implicating the others and has testified twice for the State against Perotti and Calabrese. He awaits trial in Stark County Jail.

Perotti and Calabrese were tried twice for murder to a jury, the first disagreeing and the second finding them both guilty with a recommendation of mercy.

Six weeks before Carpenter confessed, Perotti and Calabrese (R. 1317, 1318) set him up to go out on what Carpenter was told was to be a burglary. He was taken out instead and shot three times in the back, buried alive in a shallow grave, and left for dead. Calabrese previously knew how to contact Carpenter's underworld contact (R. 1322). Calabrese regarded Carpenter as "a good fellow" which in Calabrese language meant a good burglar. (R. 1331). After Perotti and Calabrese learned that Carpenter had survived the assassination attempt, they conferred personally rather than over the phone (R. 1325) about it, because it was their business (R. 1327).

Carpenter immediately asked for protective custody in Akron where Carpenter called Calabrese on the phone. This was at the suggestion of Captain Cutright, Chief of Detectives of the Akron City police department, who listened on the extension and testified as to the conversation which took place in the presence of Vincent Kinney, an F. B. I. agent. Carpenter had told Captain Cutright that Perotti and Calabrese had him shot, but not why, and nothing about the Alliance job. Cutright suggested Carpenter tell Calabrese he had written everything down and the police would get it if anything more happened to him.

This Carpenter did, and as Cutright testified (R. 961 to 965) Calabrese responded that he wanted to see Carpenter, he had something for him, the boys thought he was wonderful taking it the way he was, that he couldn't help it, it was just like he (Calabrese) had a gun at his head, the boys say if you got it you can keep it and you (Carpenter) know I (Calabrese) am trying to get into the syndicate, that he (Carpenter) had him (Calabrese) scared and Calabrese said, Jeeze, now you have really got me worried, you didn't tell about "S" and "S." This "S" and "S" meant the Alliance job involving the two Shoup

men, the elder Shoup and his son (R. 707). The money has never been recovered by authorities.

Perotti had a previous conviction for burglary and safe tampering and Calabrese for stolen car. Both men, who claimed to be truck drivers, were on unemployment compensation but each owned a new Oldsmobile 98 and Calabrese sent his boy to a $1500.00 per year military school.

Perotti and Calabrese claimed by way of alibi to have been in Pensacola, Florida together from January 30, 1957 to 10 o'clock P. M. on Wednesday, February 6, 1957. Thus in the opening statement of the defense in the first trial, and throughout the testimony of the first four defense witnesses. At this point the State discovered three Catholic priests who were in the same home during the same hours and that the men were not there, that no one mentioned their being in town, even though Perotti previously met one of the priests in Ohio. Some mention was made that Perotti had been there the week before, having driven Perotti's wife and her sister down for a baptism in the family of the home in question which took place January 31, 1957.

Upon investigation the State was able to show in the second trial, that the baptism had been planned weeks in advance for February 3, 1957, then moved up to January 31st, so that Paul Perotti could return to Ohio and not miss work (R. 1500) and the original baptismal certificate was typed up the week before, with the typewritten dated February 3, 1957, but that the Priest had crossed out this date and written in January 31, 1957, in his own hand in ink (R 1552 through 1554).

These men went to Florida to build an alibi for a Supermarket job which was planned for the week end of February 3, 1957. They did this by going to visit a Roman

Catholic Nun, Sister Pauline, on the day before the baptism, Wednesday, January 30, and telling her that the baptism was last week (R. 1093). Sister Pauline never knew during any of the trials when the baptism was with respect to the boys' visit, but gave her recollection stating frankly, "I went by what they said, they said last week" (R. 1689). Six silent months went by so far as Sister Pauline was concerned, and that was sufficient to leave her with a recollection of a visit during which she was told about a baptism "last week."

It is significant that Perotti and his wife were in Pensacola six months previous to this visit but did not try to contact Sister Pauline, but upon this later occasion, Paul Perotti, whom Sister Pauline did not even recognize was solicitous enough to take her a box of candy.

Hence, when trouble developed, the boys were ready with a baptism record showing January 31, 1957, and honestly misled Sister Pauline who recalled their visit "a week after" the baptism.

After Perotti and Calabrese returned from Florida they embarked upon the crime for which they were twice tried to a jury and finally convicted.

This crime developed as follows: Paul Carpenter was a young man of the age of 28 years who about three years ago or more, began to enter and did enter and follow a life of crime. He was engaged in various burglaries, robberies, in and about the State of Ohio, and he became associated with other persons in the same type of business.

Paul Carpenter met a man by the name of Raymond Paone who ran a billiard hall over in Alliance where he took bets. Paul Carpenter met Raymond Paone from Alliance at a New Year's Eve party at the home of a man named Louis Battista who lives here in the Canton area; that New Year's Eve party was when 1955 became 1956.

Thereafter Paul Carpenter contacted Raymond Paone about places where he could rob, which was principally Paul Carpenter's business, and in connection with that Raymond Paone told him that Frank E. Wells was one of the bigger gamblers in town and that he had a safe in his basement that had money in it.

Paone first told Carpenter about this. Paul Carpenter talked to the defendants Calabrese and Perotti on Sunday, February 3, 1957, at a time when they were engaged in a burglary at Medina. Carpenter had waited to talk and to meet with Perotti and Calabrese on the 3rd, and waited to meet with them earlier but they were not yet back from Florida.

Following Sunday, the 3rd, Arthur LaRiche, on either Monday or Tuesday, either the 4th or 5th, came to Stark County with Paul Carpenter, and LaRiche, Carpenter and Paone talked again about the home of Frank Wells. At that time Paone drove them out to show them the home and told them a man was taking care of the house while Frank Wells was away in Florida.

Frank Wells ran Treasury Tickets over at the City of Alliance, and a man named Earl Shoup was running his business for him while he was away on vacation and would come to visit the Wells home in the evenings. Paone told Carpenter about that and told LaRiche about that and they watched Shoup and learned he came in the evening and then left.

The next night on Wednesday, February 6th, Paul Perotti, Arthur LaRiche and Paul Carpenter came to Alliance to burglarize the home of Frank E. Wells. At that time Raymond Paone took them out by the house, showed them where it was, and Perotti and Carpenter and LaRiche went to the home to enter but were frightened away by a barking dog and they left and went back to Cleveland.

and early in the morning Thursday, February 7th, about at 2:00 o'clock in the morning they talked further about their plan to burglarize this home and they talked it over with Al Calabrese, one of the defendants here, at the social club that Calabrese and Perotti had something to do with in Cleveland. This club was a petty gambling place and contact point for burglars who worked with and through Perotti and Calabrese. At that time following the dog barking and frightening Perotti, Carpenter and LaRiche away from the home on Wednesday, February 6, 1957, the three men talked with Al Calabrese and in substance decided that in the residential neighborhood where the Wells home was located that the custom was for the people to park their cars up in the driveway and a car parked out on the street in front of the house would be noticed, so they felt they needed someone to drive the car, to drive them up and let them off and drive on further and to circle a block or so away and wait for them and to aid them to get away with some money and at that time Al Calabrese agreed he would help them in the burglary.

Then on Thursday night, February 7, 1957, Carpenter picked up LaRiche and came to Alliance, Calabrese and Perotti came down, and they met. Calabrese drove the car and took the men to the Wells home. Arthur LaRiche entered through the window to the south of the rear door in the basement, let Carpenter and Perotti in and Perotti had previously that evening handed Carpenter a .38 caliber pistol, and armed with the pistol which Perotti had given him, Carpenter and Perotti entered the door which LaRiche opened for them. He had broken the window at the top and entered, this in the night season.

As to Assignment of Error No. 1, it is claimed by defendants that the following charge of the Court was erroneous:

"No matter what your feeling or notion might be as to what you think the law ought to be please remember this, ladies and gentlemen, this Court would rather be wrong in charging you as to the law than for you to use your own *notion* or what ideas you might have that you think the law ought to be. I say that emphatically because I, as a Judge, or any other Judge's charge in writing, if the court is wrong there is always a remedy, but if you used your own *notion* there isn't any remedy."

It is to be noted that counsel for defendants took no exception to the charge and furthermore, if the defendants' counsel wished a further instruction as to what consideration the Jury should give to the fact that Carpenter had not been tried for other crimes that he admitted, counsel for defendants should have made a request for said charge.

The Court below pointed out that Paul Carpenter was an accomplice witness and instructed the Jury as follows:

"Evidence of an accomplice should be very cautiously received and closely scrutinized by you, together with and in the light of other evidence in the case, but when the evidence of an accomplice is found to be worthy of belief in your part you may then believe it and give it such weight as you find it to be entitled to in your sound judgment."

This is a correct statement of law.

Counsel for defendants also made no objection at the trial to any of Carpenter's testimony on the ground that he was insane or even the claim that he was insane. However, on the cross-examination of Carpenter, counsel for defendants said they wished to reserve the right to plead Not Guilty by reason of Carpenter's insanity. Neither Carpenter nor his attorneys have claimed or represented that he was presently insane or that he was insane at the

time of the trial. They have not entered a plea of Not Guilty by reason of insanity.

On this question we cite Section 2945.37 of the Revised Code:

> "Inquiry into insanity of defendant. If the attorney for a person accused of crime whose cause is pending in the court of common pleas, *before or after trial suggests to the court that such person is not then sane, and a certificate of a reputable physician to that effect is presented to the court*, or if the grand jury represents to the court that such person is not then sane, the court shall proceed to examine into the question of the sanity or insanity of said person, or in its discretion may impanel a jury for such purpose. If three fourths of such jury agree upon a verdict, such verdict may be returned as the verdict of the jury. If there is a jury trial and three fourths of the jury do not agree, another jury may be impaneled to try such question."

There is nothing in the record to show that counsel for the defendants in this case were counsel for Carpenter, as he was a witness for the State.

Also, *Vey vs. The State of Ohio*, 35 Ohio Appellate Reports, page 324:

> "6. Counsel for accused, failing to call court's attention to omission to call experts to inquire into defendant's insanity, either at trial or on motion for new trial, could not claim court erred, for first time on review (Section 13608, General Code (112 Ohio Laws, 168)."

Counsel for defendants requested no charges to the Jury. We cite *Rhoades vs. City of Cleveland*, 157 Ohio State, page 107.

> "Where claimed errors in the charge of the court are errors of omission and not errors of commission, unless

counsel has requested the court to supply the omissions, such errors of omission will not ordinarily justify a reversal. (Section 11560, General Code, applied.)"

Also, *McCane vs. Alvis, Warden*, 98 Ohio Appellate Reports, page 506:

"1. Where an accused in a criminal action makes no suggestion of insanity to the Common Pleas Court in accordance with the provisions of Section 13441-1, General Code, but instead enters a plea of guilty and sentence is pronounced accordingly, the right of such accused to a sanity hearing is waived by his plea of guilty, and the fact that accused was under guardianship at the time does not exempt him from prosecution for his criminal acts."

Counsel for defendants also cite the case of *State of Ohio vs. Bundy*, heretofore decided by this Court. Russell McCoy was also indicted for the same murder and pled Guilty by reason of insanity. The facts in that case are entirely different from the facts in the instant case.

Counsel for defendants cite for authority *Evans vs. The State of Ohio*, 123 Ohio State, page 132:

"Under Section 13441-1, General Code, if during the trial it comes to the notice of the court that a person accused of crime whose trial upon such charge is pending in the court of common pleas is not then sane, the court is required either forthwith to proceed to examine into the question of the sanity or insanity of defendant, or to impanel a jury for such purpose."

The facts in the cited case are far different from the facts now under consideration.

We find from the record that the Court properly charged the Jury on reasonable doubt, and after an examination of the Charge, we find no error in the same, and

for the reasons stated, Assignment of Error No. 1 is not well taken.

As to Assignments of Error Nos. 2 and 3, it is claimed by counsel for defendants that the State introduced into evidence portions of the record of the first trial by reading them into evidence. From an examination of the record in the instant case, we find that there is testimony that the stenographer who prepared the record in the first case was never called to the witness stand as part of the foundation for the introduction of the record. The Prosecutor did not read into the evidence portions of the record in the first trial. He simply cross-examined the defense witnesses concerning the testimony they had given in the first trial, for the purpose of showing inconsistencies between the witnesses for the defense before the alibi was broken.

For the reason stated, Assignments of Error Nos. 2 and 3 are not well taken.

As to Assignment of Error No. 4, after an examination of the entire record, we are of the opinion that there is no merit to Assignment of Error No. 4.

As to Assignment of Error No. 5, an examination of the record shows that the defendants were not present when it was stipulated into the record that arrangements concerning the housing of the Jury for the night were satisfactory to both parties. This took place while the Jury was still in deliberation. Revised Code 2311.01 reads as follows:

> "A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding."

It cannot be said that a stipulation relative to the arrangements concerning the housing of a jury is a judicial examination of the witnesses, and prejudicial error is com-

mitted under this rule only when the accused is absent during the instructions given by the Court where the accused is affected by such instructions. *State vs. Grisafulli*, 135 O. S. 87, 19 N. E. (2nd) 645 (1939).

For the reasons herein stated, we are of the opinion that Assignment of Error No. 5 is not well taken.

In a consideration of Assignment of Error No. 6, this assignment relates to the admission of evidence. The claims will be answered in the order of their discussion in and under the headings used in defendants' brief.

(a) Bill of Exceptions, pages 696 to 702, 710. Defendants' brief claims they were in no way involved in the shooting of Carpenter. In their testimony, Calabrese and Perotti admit that they made the arrangements for Carpenter to be taken out by the man who in fact shot him (R. 1317 to 1322). Further, Calabrese admits a phone conversation with Carpenter discussing this shooting and the relationship of the defendants and a crime syndicate to the shooting (R. 961 to 965 and R. 1212, 1213 and R. 1316 to 1325).

During this conversation Calabrese admitted his responsibility in it by pleading, by way of confession and avoidance that he couldn't help it, it was like he had a gun to his head, he was trying to get into the syndicate (R. 961 to 965). In this conversation Calabrese makes statements implicating himself to the crime on trial here, referring to "S and S" (R. 961 to 965).

The whole pattern of evidence proves that Calabrese and Perotti shot Carpenter to keep him quiet about their part in the crime being tried.

(b) Bill of Exceptions, pages 948 to 953. The same applies to this as applies to (a) above.

We find no merit in Assignment of Error No. 6.

As to Assignment of Error No. 7, we find from the record the following: The cross-examination of defense witness Williamson at page 1410 through 1413 simply goes to show his interest, bias and failure to speak or testify at all during the previous trial. He was not subpoenaed, but came all the way up from Florida for the second trial only, and presumably at his own expense. The cross-examination was proper.

If permitted to answer on page 1412, the witness Williamson would have answered that Choma instructed him to tell the Prosecutor nothing. This would have shown the bias of the witness. At any rate the only objection to the phone conversation was sustained.

The cross-examination of Mrs. Calabrese about her conversation with Pumphrey at pages 1480 and 1481 was to show the circumstances surrounding Pumphrey's first acquiring knowledge of the time of the crime. It generally shows her interest and the part she played in preparation of the defense. When carefully compared to Pumphrey's testimony and Blankenship's testimony, the significance is revealed. It is not hearsay since it is not used to prove the truth of the statements made but the fact that they were made and when.

All of the conversations between Pumphrey and Col. Blankenship to which Col. Blankenship testified were prior inconsistent statements of Pumphrey's for which a proper foundation had been laid. Pumphrey had either denied or failed to be able to recall all of them on cross-examination.

We find no merit to Assignment of Error No. 7.

As to Assignments of Error Nos. 8, 9 and 10, after a careful examination of the record, we find no merit to these assignments of error.

The writer of this opinion has read this entire record which consists of 1944 pages, and also the voluminous

briefs of counsel, and after a careful consideration of this case we are of the opinion that no prejudicial error intervened in this case, and that the evidence shows beyond the existence of any reasonable doubt that the defendants are guilty as charged, and applying the rule laid down in R. C. Section 2945.83, which provides as follows:

> "When new trial shall not be granted. No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> (A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;
>
> (B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;
>
> (C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby.
>
> (D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;
>
> (E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

the judgment is affirmed.

APPENDIX D.

CONCURRING OPINION OF THE COURT OF APPEALS.

(April 20th, 1959.)

PUTNAM, *P.J.*

I concur in the judgment of affirmance herein. I am impelled to write this concurring opinion because the main opinion does not discuss the two grounds of error most strenuously urged by the appellants, Nos. 1 and 4, to-wit: Errors in the charge of the court and misconduct on the part of the court. I think this Court is unanimous in holding that the other assigned errors are not well taken.

This was a hard fought case in which the defense was an alibi, supported by substantial evidence. In the end it was a jury question as to what witnesses to believe. The defense witnesses were searchingly cross-examined by the prosecuting attorney and not infrequently they were driven into a corner. At these times it was the practice of defense counsel to object to the questions and without invitation by the court, enter into long arguments in front of the jury as to the reasons for the objection, which, in the end, tended to advise the witnesses as to the answer desired. This procedure led to most of the admonitions by the court to defense counsel and resulted in arguments in front of the jury.

A proper trial procedure is for counsel to object where he thinks the question is improper. Then if the court is in doubt and wants a reason therefor, it asks for it. Otherwise, the record speaks for itself.

An illustration of this point is shown during the cross-examination of Margaret Perotti at page 1156 of the record. She asked the prosecuting attorney to move so she can see defense counsel. We will not quote herein all of the record which would make this opinion too voluminous but refer

to the following pages of the record which illustrate the above proposition and in which, in most cases, the court was right and defense counsel was wrong on these objections. These cannot be lifted out of their context but we refer to pages 1159; 1163-4-5; 1210-11-12; 1246-7-8-9-50-51; 1337-8-9; 1527-8; 1602-3; 1641; 1645; 1663-4. These illustrate matters complained about by the appellants. They are not well taken. There is a limit to which counsel can go in protecting his record and especially where the witness chair is beside the stenographer's desk and the witness can hear what is said while the attorney is dictating into the record. I feel that the court's patience was pretty well taxed in this trial and while at times its impatience shows up, a perusal of the entire record and charge does not show any bias on the court's part which would slant the jury for the state.

There are, however, several instances where the border line was reached and which deserve special mention. Appellants make much of the happening in the record at pages 741 et sequal where Carpenter was asked on cross-examination if he had been promised his life to testify in this case At this question the Court bristled, taking the intimation that the court had done so. Nor was this too far fetched. During the argument that followed and colloquy defense counsel stated that he had witnesses to the effect of such a promise. However, he never produced any such witnesses during the trial. The purpose of the court in his questions was evidently to bring out the fact that the court had nothing to do with any such promise. I think any self respecting court would have done the same. No exceptions were taken at this time nor was there any request of the court for clarification. I see no error here.

Another incident occurs at page 1259 of the record. The state was cross-examining the defendant Alfred Cala-

brese about his unemployment compensation forms which he had turned in, and had been so doing for many pages of the record. The prosecuting attorney had repeatedly used the word "subsequent" which the witness did not evidently understand. The court had theretofore been admonishing the prosecuting attorney to make his questions more clear. Then appeared the following questions and answers starting on page 1258:

"Q. I am talking about the little forms you fill out every week when you report in person, understand me?

A. Yes, the little forms.

Q. Yes, and those reports in person are made subsequent to the original application?

A. You mean they are different?

Q. You make them out after you file originally?

A. Yes.

Q. And that is referred to and you have understood it to mean a subsequent report in person form, the small one?

Mr. Wise: Object.

The Court: Yes, yes, Mr. Putman, let's get along please.

Mr. Putman: If it please the Court.

The Court: Never mind. I don't want to hear * * * there is plenty of proof.

Mr. Putman:

Q. Have you ever understood what I meant by subsequent report in person?

A. I never really did."

What the court meant by the statement "there is plenty of proof" is not entirely clear but it is reasonable to suppose that he was referring to the different cards, documentary evidence, which would show for themselves. At any rate, nothing was thought of it at the time, no objec-

tions were made or was clarification asked. When taken in context under the circumstances it was not prejudicial error, nor in my judgment does it show a bias on the part of the court.

Another instance stressed by the appellants is at page 1032-3 of the record where in cross-examination of Paul Perotti the court said "That is correct" referring to a previous statement of the prosecuting attorney. The court's statement, in the light of the fact that there was no objection or request for clarification must be given a liberal interpretation, that he agreed with the theory of the state that there was a sound basis for the cross-examination rather than that he agreed with the concluding statement that the "defendant was putting on a big act." Again evidently nothing was thought of this statement at the time and no objection was raised.

To properly evaluate the assigned errors Nos. 1 and 4 it is necessary to read and study this entire record. This is and has been a laborious task but I have come to the conclusion that the trial court was not biased and did a credible job under difficult circumstances. True, remarks were made that a court with more patience would not have made but in the end I think the case was fairly submitted to the jury.

There is only one instance in the charge of the court which is worthy of comment and that occurs at pages 1903-4 of the record. The objectionable statement is: "And likewise the fact the other two named in the indictment have not yet been brought to trial you shall give no consideration to whatever." Again this must be read in context. The court was discussing the right of the defendant to have a separate trial. We quote this charge which begins at page 1903:

> "However, in Ohio we have, as I shall refer to, another statute, or a statute that reads as follows, and

which has been referred to I believe heretofore in this case but I shall again go over the matter—.

Section 2945.26 of the Revised Code of Ohio, state that—

When one or more persons are jointly indicted for a capital offense each of such persons shall be tried separately. The Court for good cause shown on application thereof by the Prosecuting Attorney, or one or more of the defendants, may order said defendants to be tried jointly.

In this particular case, instance, these two defendants here in court applied to a former Judge for the right to be tried jointly. That means that the Court granted it and that is why they are being tried jointly at this time.

Now the other two are entitled to separate trials if they so desire, but the fact they are not in here at this time to be tried you should give no consideration to whatever. And likewise the fact the other two named in the indictment have not yet been brought to trial you shall give no consideration to whatever.

In other words, this indictment constitutes the criminal charge against each of the defendants. When each defendant was arraigned in court on this indictment and asked to plead thereto each entered a plea of not guilty. By that plea he denies he committed the act or acts charged in the indictment."

It being the duty of the court and the assignment commissioner to schedule these trials in accordance with law and there being no evidence in this case to show that the proper procedure was not followed, I can see nothing wrong with the charge.

As above stated, I think the case was fairly submitted to the jury without prejudicial error. The verdict was not against the manifest weight of the evidence. I concur in the affirmance.

ROBERT B. PUTNAM, P.J.

APPENDIX E.

DISSENTING OPINION OF THE COURT OF APPEALS.

(Dated April 18, 1959.)

McLAUGHLIN, J.

The two appellants will be referred to herein as the defendants. All forms of emphasis herein have been inserted by the writer.

This cause originated with an indictment, No. 16876, charging Paul F. Carpenter, Alfred Calabrese, Paul Perotti, and Arthur LaRiche with first degree murder in perpetrating or attempting to perpetrate a robbery.

The murdered man was named as Eldon Shoup. The date was February 7, 1957, at the residence of Frank Wells, a known gambler in Alliance, Ohio. Another indictment, numbered 16877, charged the above named four persons and Raymond Paone with burglarizing in the night season the inhabited dwelling of the said Frank Wells on the same date.

Upon arraignment all of the above named defendants entered a plea of Not Guilty to both indictments. In addition thereto, counsel for Paul Carpenter informed the Court that they reserved the right to enter a plea for him of Not Guilty by reason of insanity.

On November 21, 1957, Calabrese and Perotti, at their own request, were jointly tried before the Hon. George N. Graham, at which trial the Jury disagreed. In April of 1958 the same defendants were again tried, this time before Judge Paul Weber, and on April 17, 1958 the Jury returned a verdict of "Guilty of murder in the first degree with a recommendation of mercy."

They were sentenced in accordance with the statute. From that judgment and sentence this law appeal results, with ten assignments of error.

Assignments Nos. 2, 3, 5, 6, 7, 8 and 9 should be overruled. Assignments Nos. 1, 4 and 10 should be sustained and the judgment reversed and the cause remanded for further proceedings, according to law.

Since the statute requires us to give our reasons for reversing, we will herewith discuss assignments of error 1, 4 and 10. Assignments of error No. 4 and No. 10 will be discussed first, because they are directly connected and the error complained of is that of the Court in the conduct of the trial.

Assignment of Error No. 4.

> Error on the part of the Trial Court in that the defendants were deprived of a fair and impartial trial for the reason that the Trial Court's conduct, manner and remarks were improper, contrary to law, and highly prejudicial to the substantial rights of the Defendants.

Assignment of Error No. 10.

> Other errors apparent on the face of the record to the prejudice of these Defendants, as affirmatively appears from the record.

We deem this matter of first importance by reason of the fact that the major part of the defendants' brief and the oral argument of counsel was devoted to these two assignments of error.

On March 23, 1959 we received from Judge McClintock, a Memorandum of his Opinion, affirming this case. It consisted of some 18 pages, 8 of which were a plagiarized accounting of the Prosecuting Attorney's version of facts (beginning with the second paragraph on page 3 to and including all but the last paragraph on page 10, without quotation marks).

It suffices to say that many of the Prosecuting Attorney's statements of fact are sharply disputed by the evi-

dence and naturally they were slanted towards the State's side of the case, as well as being argumentative. This is noted not by way of criticism of the Prosecuting Attorney for doing his job well, but a search of the record does not permit us to accept the Prosecutor's statements of fact as gospel truth, as did Judge McClintock.

However, the statement of facts or the facts themselves in this case do not have much to do with these assignments of error now under discussion. These men were entitled to a fair trial before a fair and impartial Judge, regardless of the heinousness of the crime, and regardless of the guilt of the defendants. It is fundamental that everyone charged with a crime, especially a capital crime, is entitled, under the Federal and State Constitutions, to a fair trial before a fair and impartial Court.

It has long been recognized by our Courts that it is prejudicial error for a Court to so conduct himself as to comment on the evidence, or to indicate in any way to a Jury or before a Jury any opinion which the Court might have upon the evidence itself. It is likewise prejudicial error for a Court to indicate in the presence of the Jury any notion or idea of his own as to the sufficiency or lack of sufficiency of proof shown; or as to the correctness or incorrectness of any statement made by either counsel. In short, the conduct of the Court should be comported with that degree of equanimity and composure requisite to a fair and impartial trial.

The long recitation of facts contained in the Prosecuting Attorney's brief and copied by Judge McClintock, is nothing more or less than the long statement of Paul Carpenter, the State's chief and only witness against the defendants Calabrese and Perotti, which two defendants presented the defense of an alibi.

We note that Carpenter's story, implicating as it does, these two defendants, is consistent with the absence of the two defendants, as well as with the presence of these two defendants with him in the commission of this crime.

Carpenter's story as to the corpus of this crime could very well be true, and at the same time the alibi of the defendants could be true, the only difference being that Carpenter implicates Calabrese and Perotti, whereas the alibi seeks to establish that they were not there. The facts are noted to show that the defendants did have a serious and well founded defense and the State's case against them was not as cut and dried as the Prosecutor's version of the facts, copied by Judge McClintock, seems to indicate. The defense of alibi had been sufficient enough to cause the Jury to disagree when the case had been tried previously.

Now, as to the 4th and 10 assignments of error, having to do with the Court's conduct, it is our opinion that in this case the Trial Court so deported himself as to prevent the defendants from having a fair trial. We cite first, at page 741 of the record, the following colloquy which took place in the presence of the Jury:

"Q. *Were you promised your life to testify in this case?*

A. *Yes.*

The Court: *What was the last question?*

Mr. Wise: I asked if he was promised his life to testify in this case.

The Court: *By whom? Let's not have intimations unless you have some proof.*

Mr. Wise: Your Honor, I am prepared to have witnesses * * * step to the bench and give names of certain witnesses.

Mr. Putman: Object to that.

The Court: *Was it this Court?*

Mr. Wise: There was no Court involved.

The Court: *I don't think anybody Mr. Wise, can speak other than the Court.*

Mr. Wise: I realize that your Honor, but I wonder if this witness does in light of the statement he made.

Mr. Putman: *Object to the argument in the presence of the jury.*

The Court: Let's not argue.

Mr. Wise: May I go on, Your Honor?

The Court: Sustained.

Mr. Putman: *I didn't object to the question, it was answered, no, there is no objection to that particular question.*

The Court: *Which one did you object to?*

Mr. Putman: *I didn't object, Your Honor, I objected later when counsel began to talk to the Court and jury.*

The Court: The question and answer may remain.

Mr. Wise: May I have a moment, Your Honor?

* * * * *

Mr. Wise: I think that's all.

Mr. Putman: No further questions. One moment please.

The Court: *So we may clarify this, it is very important. Did any Judge ever offer you your life in this charge of Murder in the First Degree in this case?*

A. *Your Honor, no one ever promised me my life in this case.*

The Court: *The Prosecutor?*

A. No.

The Court: *Or his office?*

A. No.

The Court: *That's all.*

Mr. Putman: No further questions, Your Honor.

The Court: *You are excused.*"

We cannot condone the actions of the Court, as shown by the above excerpts from the record. First of all, this

was a very damaging admission which defense counsel had obtained from the State's chief witness. It was not objected to by the Prosecuting Attorney, but the record shows that the Court took upon himself the Prosecutor's burden and proceeded in an attempt to rehabilitate the witness for the State. Furthermore, by using the words, "Let's not have intimations unless you have some proof," the Court is increasing the burden put upon the defendants, since the question was a perfectly proper one to be asked upon cross-examination and there is no rule of law that questions containing intimations can not be properly asked.

Furthermore, the Court proceeded further to attempt to rehabilitate the State's witness and indicated in he presence and hearing of the Jury that the damaging statement or admission made by the State's chief witness wouldn't mean anything and shouldn't be given any serious consideration unless the promise was made by the Court. This is indicated by the Court's use of these words, "I don't think anybody Mr. Wise, can speak other than the Court."

It can not be argued that these remarks were not made in the presence of the Jury, because the Prosecuting Attorney himself, obviously embarrassed and trying to protect his record, very properly objected to the argument between the Court and defense counsel in the presence of the Jury.

Furthermore, we can not understand what the Court meant when he sustained an objection when there had been none, and the Prosecuting Attorney again, hastening to protect his record, uses these words, "I didn't object to the question, it was answered, no there is no objection to that particular question."

At the bottom of page 743, after both Mr. Wise and Mr. Putman had indicated that they had no more questions to ask of the State's chief witness Carpenter, the Court again took up the challenge and succeeded, in a measure, in rehabilitating that witness, saying: "So we may clarify this, it is very important. Did any Judge ever offer you your life in this Charge of Murder in the First Degree in this case?

It is to be noted that the Court in these last words improperly commented upon the evidence and placed undue emphasis upon the rehabilitation of the State's chief witness, by saying, "Did any Judge ever offer you your life in this Charge of Murder in the First Degree in this case," indicating that if anyone else had, such a promise would have no effect whatever upon the State's chief witness' credibility. It must be remembered that throughout this colloquy, defense counsel is attempting, by his cross-examination, to show that Carpenter is a person not worthy of belief. That was one of the main theories of defense.

Another main theory of the defense was that Carpenter, out of revengeful motives and to get even with a so-called syndicate of criminals operating out of Cleveland, was informing against Calabrese and Perotti, as being a guilty man himself, he hoped to save his own skin or obtain some leniency by exposing the alleged syndicate or dragging along with him two persons whom he, and he alone, claimed were members of said syndicate.

Another theory of the defense was that Carpenter was not worthy of belief in his implication of these two defendants in the Alliance murder, by reason of the fact that he had obtained lenency in the delay and postponement of his answering to any of the crimes to which he had confessed, and that the same leniency and promises were being made to Arthur LaRiche and Raymond Paone: leni-

ency to Arthur LaRiche which apparently was borne out by the statement of the Prosecuting Attorney on page 1 of his brief, to the effect that LaRiche was allowed to plead guilty to this homicide indictment which charged him jointly with Calabrese, Perotti and Carpenter, after the indictment had been reduced as to LaRiche, only, to first degree manslaughter; leniency to Raymond Paone in that he had confessed immediately upon his arrest to having fingered or pointed out the home to be burglarized and cased or set up this job of robbery, and when a murder resulted in the perpetration thereof, he was not even included in the murder indictment; leniency towards Carpenter in that he admitted that he had been promised his life for testifying in this case; leniency in that he had not been made to answer for any of the some fifteen felonies which he confessed having committed; and leniency in that no step had been taken towards the determination of his sanity when he had specifically reserved the right to plead Not Guilty by reason of insanity.

The record is replete with instances of the conduct of this particular Court, which indicates to us a bias and prejudice in favor of the State and as against the defendants, and since most of these colloquys took place in the presence of the Jury, the Jury might well have taken the statements made as an indication as to how the Court felt about any item of evidence.

At page 1033 of the record we find that the Prosecutor said during the cross-examination of the defendant Perotti:

> "The purpose of this line of interrogation is to show this man is putting on a big act here.
>
> "The Court: *That is correct.*"

Here the Court is invading the province of the Jury, commenting upon the evidence, and indicating a bias and prejudice against this particular defendant.

It has been suggested by the Prosecutor that this remark was not made in the presence and hearing of the Jury. However, the record does not so indicate, but does indicate just exactly the contrary, because the record contains many instances where the remarks, as shown by the record, took place out of the presence and hearing of the Jury. For instance, the record, pages 658, 699, 899, 959, 1008, 1038 and 1153, seven in all, indicate that the Court held conferences in Chambers, out of the presence and hearing of the Jury. In six different instances the record shows that conferences were held at the Bench, out of the presence and hearing of the Jury. (See pages 751, 823, 950, 1055, 1056 and 1092.)

Since the record does show that numerous conferences were held out of the presence and hearing of the Jury, we can only conclude that when the record does not so state, that the remarks contained in the record were made in the presence and hearing of the Jury in this case.

Another instance, as shown on page 1259 of the record, we quote the following colloquy:

> "Mr. Wise: Object.
>
> The Court: Yes yes, Mr. Putman, let's get along please.
>
> Mr. Putman: If it please the Court.
>
> The Court: Never mind, I don't want to hear * * * *there is plenty of proof.*"

The remark of the Court to the effect, "There is plenty of proof," is certainly a comment upon the evidence and upon the weight of the evidence, and is the height of impropriety, indicating a bias and prejudice for the State

and against the defendants, by saying to the Prosecuting Attorney that he need not pursue a matter further, because there is plenty of proof upon it. It matters not whether the particular matter then under discussion was one of the main issues of the case or whether it was a side issue, the remark of the Court was manifestly improper and clearly prejudicial to the constitutional rights of the defendants to have a fair trial.

At pages 1641 and 1642 we find the Court making the following statement to defense counsel:

> "Just a moment, Mr. Wise, that's an unfair interruption.
>
> Mr. Wise: I can't object?
>
> The Court: You didn't object.
>
> Mr. Wise: *I am objecting.*
>
> The Court: *Let's get this straight, Mr. Wise,* I don't want you to interfere when questions are asked unless there is an objection."

Again, at page 1643 the Court adds:

> "Now let's start over. *Let's not interfere.* This is cross-examination. *The witness said time and again he doesn't remember, he doesn't recollect, and this is one of the vital matters of the case.* The Prosecutor has a duty to do, and the defense attorney has a duty to do. It's for the jury to determine the credibility of *this witness, his truth and veracity, etc.*, but let's not do any more interrupting than we have to. All right, you may proceed."

And at page 1645 we find the Court saying to Mr. Wise these words:

> "Now, Mr Wise, *you may make all the objections you want at recess, but you are not to interrupt the cross-examination, please.*"

All in all, whether the Court's conduct was such as to prevent the defendants from having a fair trial, is to be gleaned from the entire record and to this member of the Court the Trial Court's conduct in this particular case and his entire deportment was such that "the conduct of the Court did not comport with that degree of equanimity and composure requisite to a fair and impartial trial." (Fess in *Lehman vs. Heymann*, this Court of Appeals' No. 2765, 1957.)

Assignment of error No. 1 is as follows:

"Errors on the part of the Trial Court in the Court's charge to the Jury."

First of all, let us dispel one wrong statement in the Prosecutor's brief that has been copied, word for word, into Judge McClintock's Memorandum, as follows:

"In fact, defense counsel made no exception whatsoever to the Court's charge."

A careful reading of the record at page 1927 shows that a general exception to the Court's charge was noted in the record for both the State and the Defendants. In our opinion, this is sufficient to preserve an exception in a first degree murder case.

One particular part of the Court's charge, we think, was definitely prejudicial herein:

"The fact that the other two named in the indictment have not yet been brought to trial, you shall give no consideration to whatever."

We have previously stated that one of the theories of the defense was that Carpenter and LaRiche, the other two named in the indictment, were given leniency and promises of leniency consisting of delays in the disposition or prosecution of their particular cases. The Jury,

in our opinion, was entitled to consider, as bearing on Carpenter's credibility, the fact that Carpenter had not yet been sentenced nor brought to trial on many of the various crimes to which he confessed, and that nothing had been done, beyond his arraignment, for his confessed participation as being the trigger man in the murder of which this trial concerned. We think, also, that the Jury was entitled to consider, as bearing upon Carpenter's credibility, the fact that he had been leniently treated in that no steps had been taken looking to clearing up the matter of his sanity, he having reserved the right to plead Not Guilty by reason of insanity.

In the recent case of *State vs. Bundy*, No. 2799 in this Court, Judge Putnam made this observation:

> "At this point it seems proper to interject this further observation. McCoy has not yet stood trial for any of his numerous capital crimes. Who knows what the evidence in those trials will develop? Will he be found not guilty by reason of insanity? If such should be the case, what effect would this have upon the credibility of his testimony in this case against Bundy? If in the end it should be decided that Bundy should pay the extreme penalty, in any case, should this penalty be exacted until McCoy has stood trial for his crimes?"

If we take this quotation and substitute the name of Carpenter for that of McCoy in the second line thereof, Judge Putnam's remarks become pertinent to the case at bar, the only difference being that in the *Bundy* case, McCoy had actually entered a plea of Not Guilty by reason of insanity, whereas in the instant case, Carpenter has merely reserved the right to enter the same plea.

The Jury was entitled, as bearing upon Carpenter's credibility, to consider the fact that no step whatever had

been taken to bring Carpenter to the bar of justice to answer for the same crime for which these two defendants were being tried.

Was Carpenter's delay for the purpose of enabling someone to keep their promise to him of saving his life for testifying in this case or was the delay in bringing Carpenter to the bar of justice for the purpose of allowing him to receive the same treatment that was afforded to Arthur LaRiche, by allowing him to plead to a first degree manslaughter in a first degree murder indictment, and receive a much lighter sentence? Was it to enable the State to later on dismiss the charges entirely as against Carpenter and not bring him to trial at all, or to continue delaying his answering to the murder charge and be sentenced, with the other State's witness, Raymond Paone, who was not even indicted for murder, even though he confessed to casing and fingering the entire job at the Frank Wells' home in Alliance. All of these things were proper matters for the jury to consider as bearing upon the credibility of Carpenter.

It is therefore our opinion that the charge of the Court, in the words above quoted, was prejudicial error.

The Prosecutor contends, that whatever error might have been contained in this particular passage was cured when the Court gave other parts of his charge, many of which were quoted. However, since the passage above quoted was error, which affirmatively shows on the face of the record, it can not later be cured by giving a correct statement of the law, as there is no assurance as to which charge the jury followed, and this Court will not presume the jury followed the correct rule to the exclusion of the incorrect rule.

The right to a fair trial is a fundamental concept to the administration of criminal law. This being a first de-

gree murder case, the Trial Court should have been *especially vigilant* and *careful* to see that the accused were given a fair and impartial trial. Because of the sacredness of human life, the responsibility of the trial Judge is increased in a capital case. The requirement is that of a *zealous* care to see that there is the *strictest* observance not only of the statutory provisions, but of the rules of law judicially prescribed.

It strikes us that there can be no doubt but what the trial Court was guilty of such misconduct in the respects mentioned, that these defendants did not have a fair trial, a trial to which they were entitled under the rules of law which the trial Judge should have been zealous to apply.

Judge McClintock contends that the record shows guilt proved beyond a reasonable doubt. Perhaps so, although it is to be observed that the proof of the defendants' participation in this robbery-killing was by one witness and he the confessed trigger man accomplice.

It is not sufficient to say that there is adequate proof of guilt, nor to stress how revolting the crime charged may be, nor to intimate that great public good has resulted from these convictions, because a ring or syndicate of criminals has been broken or exposed. Regardless of these facts, it does not follow that these defendants were not prejudiced erroneously and prevented from receiving a fair trial by the injection of the matters we have pointed out. Who can say to what extent the convictions may have been due to the improper conduct of this trial Judge? Section 2945.83 R. C. is not a "substantial justice" statute, such as applies to civil actions. It is mere requirement that reversal shall not be ordered unless the error be prejudicial, substantial and affirmatively shown. But the accused's right to a fair trial, free from prejudice, is recog-

nized and mentioned in the statute. The word prejudiced is used four times.

Simply because this was not a Chair Verdict does not say that this reviewing Court should look upon the record with less concern for the fundamental rights of the accused. Lifetime liberty, often more precious than life itself, was here at stake.

In the case of *State of Ohio vs. Cocco*, 73 Ohio Appellate Reports, page 188, Judge Montgomery used the following language:

> "To put it succinctly, a man on trial for his life, his most valuable possession, the most sacred of his guaranteed rights, is entitled to have strict compliance with the rules of law, regardless of the probability or even the proof of his guilt."

The judgment should be reversed and cause remanded.

APPENDIX F.

JOURNAL ENTRY OF THE COURT OF APPEALS.

May 11, 1959:

This cause came on for hearing upon the appeal of questions of law, assignments of error, bill of exceptions, briefs, the transcript of original papers and pleadings from the Court of Common Pleas, Stark County, and was argued by counsel, on consideration whereof, the Court find that there is no error apparent on the record in said proceedings and judgment prejudicial to the appellants, and it is ordered that said judgment is hereby affirmed. To all of which defendants-appellants except.

APPENDIX G.

PER CURIAM OPINION OF THE SUPREME COURT OF OHIO.

Appeal From the Court of Appeals for Stark County.

In the Court of Common Pleas the defendants were indicted, tried and convicted of the offense of murder in the first degree for killing Eldon Shoup on February 7, 1957, while the defendants were perpetrating or attempting to perpetrate burglary. The jury recommended mercy.

On an appeal to the Court of Appeals on questions of law, the judgment of the Court of Common Pleas was affirmed with one judge dissenting.

The cause is in this Court by reason of the defendants' appeal as of right and the allowance of their motion for leave to appeal.

Per Curiam. In this Court the defendants present five assignments of alleged prejudicial error on the part of the trial court, only two of which warrant discussion by this Court.

The first is a claim of misconduct by the trial judge in the form of certain incidental statements made in the presence and hearing of the jury.

Taken out of their context, some of the trial judge's observations seem unnecessary and of questionable propriety. However, a careful study of the entire record discloses the combination of circumstances under which the judge felt impelled to admonish the defendants' counsel. This is illustrated by the counsel's annoying tendency to indulge in extended arguments in the presence of the jury whenever the judge overruled his objections to questions asked of defense witnesses on cross-examination. It is an understatement to observe that the resulting repartee was hardly complimentary to either the judge or counsel. In

one instance the judge said, "Now, Mr. Wise, you may make all the objections you want at recess, but you are not to interrupt the cross-examination please." That the judge was showing his umbrage at the interrupting argument and not at the objections is disclosed by a closely related statement, "Let's get this straight, Mr. Wise, I don't want you to interfere when questions are asked unless there is an objection."

Another similar example occurred when the defense counsel was cross-examining one of the state's witnesses who was an accomplice in the murder. In response to a question whether he had been promised his life if he testified in the case, he answered in the affirmative. Then in a moment of understandable overzealousness, the judge immediately questioned the witness to learn whether he was intimating that the judge or anyone else in authority had been guilty of making such a promise. The witness then said that no one ever promised him his life in this case. Obviously this was an important matter that demanded clarification for the jurors.

A third example occurred when the prosecuting attorney was cross-examining one of the defendants about his unemployment compensation forms which he had filed.

> "Q. I am talking about the little forms you fill out every week when you report in person, understand me? A. Yes, the little forms.
>
> "Q. Yes, and those reports in person are made subsequent to the original application? A. You mean they are different?
>
> "Q. You make them out after you file originally? A. Yes.
>
> "Q. And that is referred to and you have understood it to mean a subsequent report in person form, the small one?

"Mr. Wise: Object.

"The Court: Yes, yes, Mr. Putman, let's get along, please.

"Mr. Putman: If it please the Court.

"The Court: Never mind. I don't want to hear—there is plenty of proof.

"Mr. Putman.

"Q. Have you understood what I meant by subsequent report in person? A. I never really did."

Just what the judge meant by the statement "there is plenty of proof" is not definite, but apparently he was referring to the different cards which showed for themselves. In any event, defense counsel did not consider the statement of sufficient importance either to interpose an objection or to request a clarification.

The next assignment of error relates to the judge's charge to the jury. He said in part, "And likewise the fact that the other two named in the indictment have not yet been brought to trial you shall give no consideration to whatever." Again when scrutinized in the light of the context, it becomes clear that the judge was giving the jury a correct explanation of the statutory rights of the several defendants to separate trials.

When the record is studied in its entirety, no error prejudicial to the rights of the defendants is disclosed. Hence, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

WEYGANDT, C. J., ZIMMERMAN, MATTHIAS and HERBERT, JJ., concur.